92-369

NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THEODIS MILLBROOK, Petitioner

V.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

What is the proper definition of "prevailing party" under the Equal Access to Justice Act?

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IN THE SUPREME COURT OF THE UNITED STATES

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OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Appellant petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, but is attached hereto as Appendix A. The Order denying Petition Rehearing is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals (App. A) was entered June 26, 1992. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The relevant provisions of 28 U.S.C.A. § 2412 are set forth in Appendix C.

STATEMENT

This case concerns 28 U.S.C.A. § 2412, which involves attorney's fees and costs under the Equal Access to Justice Act. The history of this case is lengthy and complex.

Theodis Millbrook filed a claim for Social Security disability benefits and he was placed on the disability roles on April 20, 1976. He was later informed by Social Security that his disability had ceased in November 1981, and his monthly benefit checks were stopped effective January 1982. Mr. Millbrook did not appeal this determination, but instead filed a new application for disability

insurance benefits in July 1982, alleging an onset date of April 1976.

The July 1982 application was denied through all administrative steps, and a civil action was commenced in the United States District Court for the Eastern District of Arkansas. The District Court denied this claim in December 1984, and Mr. Millbrook appealed to the United States Court of Appeals for the Eighth Circuit. The U.S. Court of Appeals denied the claim in December 1985. Millbrook v. Heckler, 780 F. 2d 1372 (8th Cir. 1976).

In January 1986, Mr. Millbrook filed a new application for disability insurance benefits, once again alleging an onset date of April 1976. This claim was denied through all the administrative steps and Mr. Millbrook appealed it to the U. S. District Court for the Eastern District of Arkansas in January 1988.

In May 1988, the District Court remanded the case to the SSA for further

administrative proceedings. A supplemental hearing was held before an Administrative Law Judge (ALJ), who subsequently denied the claim for benefits. The ALJ's decision was adopted by the Appeals Council in the early part of 1989. Mr. Millbrook sought judicial review of the Appeals Council's decision, which resulted in a second remand from the District Court to SSA in June 1990.

Another hearing was held before an ALJ in November 1990, but the ALJ once again denied the claim for benefits. Mr. Millbrook appealed the ALJ's decision, and in November 1991, the Appeals Council remanded the claim once again to the ALJ for further proceedings.

Another hearing was held in January 1992 after which the ALJ issued a decision wholly favorable to Mr. Millbrook. In his decision, the ALJ concluded that Mr. Millbrook had continuously been disabled since his original period of disability.

began, and that he was entitled to benefits from the time SSA originally stopped his check until the present time.

In May 1992, Mr. Millbrook filed with the U. S. Court of Appeals for the Eighth Circuit a petition for attorney's fees and costs pursuant to the Equal Access to Justice Act, requesting fees and costs for all services performed subsequent to January 18, 1985--the date claimant appealed his July 1982 application to the U. S. Court of Appeals.

On June 26, 1992, the U. S. Court of Appeals denied Mr. Millbrook's motion without any explanation (Appendix A). Mr. Millbrook filed a Petition for Rehearing on July 7, 1992, which was denied by the Court on August 6, 1992 (Appendix B).

REASONS FOR GRANTING THE PETITION

The U. S. Court of Appeals for the Eighth Circuit denied Theodis Millbrook's motion for attorney's fees and costs under the EAJA without explanation. The

question as to whether Mr. Millbrook is entitled to an award of attorney's fees and costs under the EAJA turns on whether Mr. Millbrook can be considered "a prevailing party" under the EAJA.

The Courts which have decided this issue have held that a claimant becomes a "prevailing party" when an affirmative decision is made that he is entitled to the benefits he seeks. Rollins v. Sullivan, 784 F. Supp. 253 (E.D. Pa. 1991); Brown v. Secretary of Health and Human Services, 747 F. 2d 878 (3d Cir. 1984); McGill v. Secretary of Health and Human Services, 712 F. 2d 28 (2d Cir. 1983); Green v. Bowen, 877 F. 2d 204 (2d Cir. 1989); Texas State Teacher Association v. Garland Independent School District, 109 S. Ct. 1486 (1989); Swedberg v. Bowen, 804 F. 2d 432 (8th Cir. 1986).

Mr. Millbrook's status as a "prevailing party" is not dependent on an affirmative court decision. Rather, the

key factor is that the claimant ultimately received the benefits he sought for the period of time originally appealed to the Court in Millbrook v. Heckler, 780 F. 2d 1371 (8th Cir. 1986).

In Green v. Bowen, 877 F. 2d 204 (2d Cir. 1989), the Second Circuit Court of Appeals "[found] nothing in the EAJA that requires that a party prevail in a civil action reviewing a final agency determination." Citing the United States Supreme Court's decision in Texas State Teachers Association v. Garland Independent School District, 109 S. Ct. 1486 (1989), the Second Circuit concluded that if the claimant succeeded on a significant issue in litigation and achieved some of the benefit he sought in bringing suit, he was entitled to an award under the EAJA.

Though the Eighth Circuit Court of Appeals gave no explanation for its denial of Mr. Millbrook request for fees and

costs under the EAJA, it was apparently because the Court felt he had not attained prevailing party status. But, if a claimant achieves success on a significant issue, either in or out of Court, then he is a prevailing party so long as this success was not completely unrelated to the litigation.

The only occasions where attorney's fees have not been granted have been when the claimant's only success is on a claim not originally sought in the litigation, Swedberg v. Bowen, 804 F. 2d 432 (8th Cir. 1986), or when success resulted solely from an independent change in law such that the claimant would have received the requested benefits even if suit had never been filed. Solely v. Bowen, 873 F. 2d 1153 (8th Cir. 1989).

In the case at hand, the ultimate success of the claim was directly related to the litigation. Mr. Millbrook ultimately prevailed on the exact issue

pursued through the litigation in Millbrook v. Heckler, 780 F. 2d 1371 (8th Cir. 1986). The Social Security Administration ultimately reversed their previous denials of the claim filed in Millbrook and allowed the claimant to prevail on all issues.

The purpose of the EAJA is to encourage government agencies to act in an equitable manner and not to unreasonably create the necessity for litigation. Brown v. Secretary of Health and Human Services, 747 F. 2d 878 at 880 (3d Cir. 1984), (citing H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12 reprinted in 1980 U.S. Code Cong. and Ad. News, 4953, 4991). This case supports the legal principal that attorney's fees be awarded to Mr. Millbrook for prevailing on the issue of the cessation of his disability and termination of his disability benefits in 1982.

In Texas State Teachers v. Garland Independent School District, 109 U.S. 1486, 1493 (1989), the U. S. Supreme Court stated:

> " . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under Hensley, not to the availability of a fee award vel non."

It is Mr. Millbrook's overall success which should be viewed in this instance. He was ultimately awarded all benefits which he sought, after ten years of litigation! He is a prevailing party for the purposes of an award of attorney's fees even though it was not the Court that made the award, but rather the administrative agency.

Here is the irony of this case: a party has a claim against an administrative agency; the claimant loses all the way through the Courts. Next, the

claimant refiles alleging the original onset date, then the agency agrees with the claimant and awards benefits that the claimant sought in the initial claim.

But when the agency is requested to pay the costs and attorney's fees under the EAJA because the claimant was a prevailing party, the agency says: "No." We ask the Court to say: "Yes." Because to do otherwise would leave a "loophole" in the EAJA award system.

To avoid an inequitable result, Theodis Millbrook urges the Court to grant his Petition for a Writ of Certiorari so that there will be consistency among all circuits as to the proper definition of "prevailing party" under the EAJA.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

ORIGINAL SIGNED BY
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August 25, 1992.

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

NO. 85-1112EA	*	
	*	
Theodis Millbrook,	*	
	*	Appeal from the
Appellant,	*	United States
	*	District Court for
vs.	*	the Eastern
	*	District of
Secretary of Health	*	Arkansas
and Human Services,	*	
	*	
Appellee	*	

Appellant's motion for EAJA attorney fees and expenses has been considered by the court and is denied.

June 26, 1992

Order Entered at the Direction of the Court:
/Michael E. Gans/
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

NO. 85-1112EA	*	
	*	
Theodis Millbrook,	*	
	*	Appeal from the
Appellant,	*	United States
	*	District Court for
vs.	*	the Eastern
	*	District of
Secretary of Health	*	Arkansas
and Human Services,	*	
	*	
Appellee	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

August 6, 1992
Order Entered at the Direction of the Court:
/Michael E. Gans/
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX C

28 U.S.C.A. § 2412 provides:

"**§ 2412. Costs and fees**

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

. . . . "

(2)

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OCTOBER TERM, 1992

THEODIS MILLBROOK, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly denied petitioner's request for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1992. A petition for rehearing was denied on August 6, 1992. Pet. App. 17. The petition for certiorari was filed on August 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Over an eleven year period, petitioner Theodis Millbrook filed three separate applications with the

Social Security Administration (SSA) seeking disability benefits due to a heart condition that allegedly became disabling in 1976. This case concerns petitioner's entitlement under the Equal Access to Justice Act (EAJA) to attorney's fees incurred in the course of an unsuccessful appeal from the denial of his second application.

1. Petitioner's first application for disability benefits was filed on January 17, 1977. The SSA awarded petitioner disability benefits for a period of disability beginning April 20, 1976. On December 18, 1981, however, the SSA notified Millbrook that it had determined that his disability had ended in November 1981, and it accordingly terminated benefits in January 1982. Petitioner did not file a request for reconsideration within 60 days after he received his notice of termination of benefits, nor did he appeal the determination. See *Millbrook* v. *Heckler*, 780 F.2d 1371, 1372 (8th Cir. 1985).

2. Approximately seven months later, petitioner filed a second application for disability benefits, again claiming that he had been disabled since April 20, 1976, due to heart trouble. The second application was denied at all administrative levels, and petitioner sought review in federal district court. The district court denied any relief to petitioner. On appeal, the Eighth Circuit affirmed, concluding that substantial evidence supported the Secretary's determination that petitioner could perform sedentary work despite his heart condition. 780 F.2d at 1374. Petitioner sought no further review of that decision.

3. On January 2, 1986, petitioner filed a third application for disability benefits, again alleging disability

from hypertension and angina since April 20, 1976. This application was also denied through all administrative levels. Petitioner then brought a new suit in federal district court, seeking review of the Secretary's denial of the benefits sought in his third application. The district court twice remanded the case to the agency for further administrative proceedings so that the Secretary could consider new medical evidence. On April 21, 1992, during the course of the second remand, the administrative law judge awarded petitioner disability benefits. Petitioner accordingly sought dismissal of his action in the district court, which the court entered on May 11, 1992. No issues concerning petitioner's third application were ever presented to the court of appeals.

4. After petitioner prevailed on his third application for benefits, he filed two nearly identical motions for attorney's fees and expenses under EAJA: one in the district court and one in the court of appeals. The petition for attorney's fees in the district court was referred to a magistrate judge and is still pending. Only petitioner's claim for attorney's fees in the court of appeals is at issue here.

In his fee petitions, petitioner noted that he had achieved his original goal of obtaining disability benefits dating back to December 1981, when the SSA had terminated his benefits. He therefore claimed that he was entitled to all fees incurred in both the district court and the court of appeals after May 31, 1983, when he first brought suit in the district court to gain those benefits. The Secretary objected to an award of EAJA fees and expenses for time spent before the court of appeals on the ground that

petitioner had lost, not prevailed, on the only issue presented to that court in 1985: the denial of petitioner's second (July 1982) application for benefits.

On June 26, 1992, the court of appeals denied petitioner's fee petition. Pet. App. 16. The court denied rehearing on August 6, 1992. Pet. App. 17.

ARGUMENT

Petitioner contends that he was entitled to attorney's fees under EAJA for an unsuccessful appeal of the denial of his second application for benefits based solely on the fact that he subsequently obtained benefits on a third application. The decision of the Eighth Circuit denying petitioner EAJA fees for an unsuccessful appeal to that court was correct, however, and does not conflict with any decision by this Court or by any other court of appeals. Further review is therefore unwarranted.

1. To qualify for EAJA fees, a litigant must have been a "prevailing party" in a "civil action" against the United States.[1] The court of appeals correctly concluded that petitioner was not a "prevailing party" in any "civil action" before that court.

---

[1] EAJA provides, in relevant part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action * * * including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. 2412(d)(1)(A).

The "civil action" before the Eighth Circuit was a suit challenging the Secretary's denial of petitioner's second application for benefits. Petitioner clearly did not prevail in that "civil action," because the court of appeals affirmed the Secretary's denial of benefits. 780 F.2d at 1374. As petitioner admits, Pet. 6, he did not seek further review of the court of appeals' decision and instead filed a completely new application for disability benefits in January 1986. Consequently, the "civil action" challenging the denial of benefits sought in the second application became final. Because petitioner never prevailed in the civil action before the court of appeals, he is not entitled to an award of EAJA fees in connection with that litigation. See *Texas State Teachers Ass'n* v. *Garland Indep. School Dist.*, 489 U.S. 782, 791 (1989) ("A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of the litigation.").

Petitioner essentially attempts to merge two distinct civil actions. Each final decision of the Secretary is reviewable by a separate "civil action." *Sullivan* v. *Finkelstein*, 496 U.S. 617, 624-625 (1990). Petitioner accordingly brought two "civil actions," one challenging the Secretary's denial of his second application and one challenging the Secretary's denial of his third application. For EAJA purposes, a "civil action" may include proceedings before the agency after certain types of remands, if the claimant's suit remains pending in federal court. See *Sullivan* v. *Hudson*, 490 U.S. 877, 892 (1989); *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157, 2162 (1991). But the Eighth

Circuit's 1985 decision finally rejected petitioner's challenge to the Secretary's denial of his second application. No remand to the agency resulted from that decision.

Petitioner contends that his status as a prevailing party was "not dependent on an affirmative *court* decision. Rather, the key factor is that the claimant ultimately received the benefits he sought." Pet. 9-10. The Secretary agrees that a claimant must have been awarded benefits to be a "prevailing party" under EAJA. See *Hudson*, 490 U.S. at 886-887 (award of benefits on remand to agency makes a Social Security claimant a "prevailing party" for EAJA purposes); *Swedberg* v. *Bowen*, 804 F.2d 432, 434 (8th Cir. 1986) (to be a "prevailing party" under EAJA a disability benefits claimant "must obtain those benefits which he sought on the original appeal to the district court"); *Brown* v. *Secretary of HHS*, 747 F.2d 878, 883 (3d Cir. 1984) ("it is the receipt of * * * benefits that renders a typical Social Security plaintiff a prevailing party"); *McGill* v. *Secretary of HHS*, 712 F.2d 28, 32 (2d Cir. 1983) (a Social Security claimant "will not become a prevailing party unless and until she is awarded benefits"). But the EAJA fees sought must have been incurred in the "civil action" that resulted in "prevailing party" status. The relief that petitioner obtained on his third application was similar to that which he had sought in his second application, but he ultimately prevailed because of the separate "civil action" brought to review the denial of his third application.[2] The court of appeals therefore properly

[2] The Secretary accordingly does not dispute that petitioner is a "prevailing party" within the meaning of EAJA in the

denied petitioner any fees for his unsuccessful appeal of the denial of his second application. Cf. *Hensley* v. *Eckerhart*, 461 U.S. 424, 435 (1983) (no fees appropriate for work on unsuccessful distinct claims).

2. Contrary to petitioner's contention, the decision of the court of appeals does not conflict with those of other circuits. Petitioner's reliance, Pet. 9-10, on *Green* v. *Bowen*, 877 F.2d 204, 206 (2d Cir. 1989), is misplaced. In *Green*, a Social Security disability claimant filed a mandamus action to compel the Secretary to process his request for reconsideration of the denial of benefits after the Secretary refused to process the request on timeliness grounds. The parties stipulated to a dismissal of the mandamus action after the SSA voluntarily reopened Green's claim. Although the SSA ultimately awarded Green the disability benefits that he had been seeking, the district court held that Green was not a prevailing party because he had not prevailed in a civil action reviewing a final agency determination. 877 F.2d at 205-206. The Second Circuit reversed, essentially holding that the mandamus action had been a catalyst for the eventual award of benefits, making Green a

---

"civil action" seeking review of his *third* application for benefits. After the Secretary initially denied that application, petitioner sought review in the district court by bringing a new civil action and, after several remands for additional evidence, ultimately succeeded in obtaining benefits. Even as to the third application, however, the Secretary contends that his position was "substantially justified," precluding any award of fees under 28 U.S.C. 2412(d)(1)(A). See Def. Response to Pltf. Mot. for Atty's Fees and Other Expenses Pursuant to the Equal Access to Justice Act, No. J-C-88-36 (E.D. Ark. filed Aug. 18, 1992).

prevailing party within the meaning of EAJA. *Id.* at 206.

In this case, petitioner's unsuccessful appeal to the Eighth Circuit was in no sense a catalyst for the subsequent award of benefits. Unlike Green, petitioner undeniably lost before the Eighth Circuit. Petitioner won his benefits not on a remand from the court of appeals, but on a remand from the district court in a new civil action based on a separate application for benefits supported by new and different evidence. Because the Eighth Circuit's decision in no way led to petitioner's ultimate success in gaining benefits, the court of appeals properly denied his request for fees for work before that court. None of the cases cited by petitioner suggests a contrary result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1992